

ATTACHMENT A  
SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ORDER  
ORDER NO. R1-2016-0038

**Administrative Civil Liability Methodology**

Introduction

On November 17, 2009, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy ("Enforcement Policy"). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in California Water Code section 13385(e). The policy can be found at:

[http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final11709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11709.pdf)

The agreed upon administrative civil liability amount is based on the Regional Water Board Prosecution Team's use of that methodology. The Prosecution Team prepared this Attachment, and the Parties have not stipulated to its contents. The May 22, 2013 Regional Water Board inspection report, was the basis for the factual determination in this methodology analysis.

The Settling Respondent has supplemented the public file with three documents that the Prosecution Team reviewed and considered: 1) Erickson Engineering Inc., Reservoir Water Removal Evaluation (January 21, 2014), 2) Charles H. Hanson, Ph.D., Assessment of Potential Effects to Salmonids Resulting from the Discharge of Suspended Sediment into Salmon Creek (March 2014), and 3) photo comparison of unnamed tributary from April 15, 2013 and April 2014.

Discharge Violation

The Settling Respondent violated California Water Code section 13385(a)(5) by pumping water from a larger pond under construction on his property, which discharged approximately 867,110 gallons of highly turbid water to a stock pond which overflowed into the Salmon Creek watershed from April 9 to April 10, 2013. Prosecution Team staff calculate that the stock pond already contained an estimated 127,200 gallons of water prior to receiving water from the larger pond. Thus, the discharge to Salmon Creek was approximately **739,910 gallons**. The Settling Respondent did not have a permit to discharge the water from his property pursuant to federal Clean Water Action section 301 (33 U.S.C. § 1311).

Per-Gallon Determination

The Potential for harm is 7.5. This is determined by the sum of the factors for a) the potential for harm to beneficial uses (4 – above moderate); b) the physical, chemical,

biological or thermal characteristics of the discharge (2.5 – above moderate); and the susceptibility for cleanup or abatement (< 50 %). The deviation from requirements is major.

The watershed is a Central California Coast Evolutionarily Significant Unit designated by the National Oceanic and Atmospheric Administration and National Marine Fisheries Service (NOAA) and is known to support Coho salmon and California Freshwater Shrimp, both listed as endangered species under the United State Endangered Species Act. The Salmon Creek watershed is comprised of highly erodible soils referred to as the Goldridge Series.

Based on these two parameters, and an evaluation of whether any consideration is appropriate for a “high gallon discharge”, a per-gallon assessment of \$2 is appropriate because the nature of the discharge is somewhat comparable to a construction storm water discharge. Liability is assessed on a discharge of 739,910 gallons. Therefore, the initial amount of liability based on the volume discharged is \$738,910.

$(739,910 \text{ gallons} - 1,000 \text{ gallons not cleaned up}^1) \times (0.5 \text{ per gallon factor}^2) \times (\$2 \text{ per gallon}) = \$738,910.$

#### Per Day Determination

Based on the facts in this case, a per day assessment for the discharge is appropriate since the pump was going April 9 and 10, 2013, and the effects of the discharge lasted for at least six days. Using the same potential for harm score and the extent of deviation use in the per gallon analysis, the per-day factor of 0.5 is applied to a conservative two days of discharge. Therefore, the initial amount of liability is \$10,000.

$(\$10,000 \text{ statutory maximum per day}) \times (0.5 \text{ per day factor}^3) \times (2 \text{ days of violation}) = \$10,000$

#### Adjustment Factors to Determining Total Base Liability Amount

The Settling Respondent’s culpability factor is 1.1. This value is based on his knowingly discharging the first pond to the smaller, second pond so that he could perform construction on the first pond. When he left the property on April 9, 2013, he was aware that the smaller pond would overflow and did not cease the pumping from the first pond.

The Settling Respondent’s cleanup and cooperation factor is 1. This value is based on his cooperation with all persons and agencies investigating the discharge. This factor is not reduced because no cleanup was performed.

The Settling Respondent’s history of violations factor is 1, a neutral factor, for the purposes of settlement.

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<sup>1</sup> Pursuant to Water Code § 13385(c)(2)

<sup>2</sup> Multiplier derived from Table 1 in Enforcement Policy, p. 14.

<sup>3</sup> Multiplier derived from Table 2 in Enforcement Policy, p. 15.

Based on these adjustments, the amount revised from the initial liability is \$823,801 for this violation.

(Initial liability) x (culpability factor) x (cleanup and cooperation factor) x (history of violations factor) = Total base liability amount

$\$748,910 \times 1.1 \times 1 \times 1 = \$823,801$

#### Ability to Pay and to Continue in Business

The factor for the ability to pay the liability and to continue in business is a neutral 1 because the property itself is a sufficient asset commensurate with the assessed penalty.

#### Other Factors as Justice May Require

The Board finds that it is appropriate to increase the Total Base Liability amount by \$10,000 in consideration of investigation and enforcement costs incurred in prosecuting this matter. Increasing the Total Base Liability amount in this manner serves to create a more appropriate deterrent against future violations. Therefore, the liability amount is adjusted to \$833,801 to include these staff costs.

Mitigating Circumstances: On January 31, 2014, the Superior Court of California, Sonoma County, ordered Mr. Kistler to pay a civil penalty of \$25,000 pursuant to California Fish and Game Code section 5650.1, \$8,653.96 to the California Department of Fish and Wildlife for their investigative costs, and \$5,000 to the National Fish and Wildlife Pollution Fund in *cy pres* relief. Therefore, this recommended administrative civil liability is reduced by \$38,653.96.

#### Economic Benefit

Any estimate of economic benefit is not able to capture the fact that the Regional Water Board would not have issued a waste discharge requirements permit for the Settling Respondent's actions. However, the business cost of obtaining a permit, submitting the required monitoring reports, and materials for implementing best management practices is roughly estimated at \$100,000.

The Enforcement Policy requires that the adjusted Total Base Liability Amount be at least 10% higher than the economic benefit amount. It is more than 10% higher and therefore the liability is not adjusted for this factor.

#### Maximum and Minimum Liability Amounts

The maximum liability provided for by statute for one violation of Water Code section 13385 for having discharged 739,910 gallons over two days is \$7,409,100.

Though there is no statutory minimum, the Enforcement Policy requires 10% more than the economic benefit, which is approximately \$110,000.

### Final Administrative Civil Liability Amount

The final liability amount consists of the added amounts for the adjusted per gallon and daily violations. Using the penalty methodology as described above, along with the maximum and minimum amount, the penalty amount should be \$795,147.04.